

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

|                          |   |  |
|--------------------------|---|--|
| UNITED STATES OF AMERICA | ) |  |
|                          | ) | Criminal No. 1:07CR209                     |
| v.                       | ) |  |
|                          | ) | Hon. T.S. Ellis, III                       |
| WILLIAM J. JEFFERSON,    | ) |  |
|                          | ) | Trial: Tuesday, June 9, 2009 at 10:00 a.m. |
| Defendant.               | ) |  |

**GOVERNMENT’S RESPONSE TO THE  
DEFENDANT’S MEMORANDUM CONCERNING WHETHER  
ANY STATEMENTS BY LORI MODY IMPLICATE RULE 806**

The United States of America, by and through its undersigned attorneys, respectfully responds to Defendant Jefferson’s memorandum filed yesterday regarding whether any statements to be offered by the government of Lori Mody, who the government does not intend to call in its case-in-chief, implicate Rule 806. In spite of the vitriolic tone of the defense’s memorandum, the defense only challenges two audio recordings out of the 134 audio clips claiming that those two recordings, both of which are from a March 31, 2005, meeting between Mody and co-conspirator Brett Pfeffer, implicate Rule 806. Def. Mem. at 7-9. But even when limited to just those two recordings, the defense’s claims are misplaced.

When it comes to the documents, out of the 168 exhibits in Series 3 of the government exhibits, the defense can muster only 10 exhibits that the defendant argues implicate Rule 806. *Id.* at 9-12. These 10 exhibits contain documents that relate to different meetings between the defendant and Mody during the spring and summer of 2005. Of those 10 exhibits, the government no longer intends to seek the admission of four of them at trial without Mody testifying from the witness stand.

Thus, there are only six exhibits about which the government and the defense differ. With regard to this limited number of exhibits, the facts and law demonstrate that the way in which these exhibits will be used at trial will not implicate Rule 806.

Lastly, the defense claims broadly -- without a citation to any legal authority -- that even if this Court were to conclude that all eight exhibits implicate Rule 806 and the government withdrew them, the defense is still entitled to the records and information presently before the Court. The defense makes this claim even while admitting that none of the matters before the Court were known to him during the undercover investigation -- and thus could not be relevant to an entrapment defense or have any impact whatsoever on the defendant's *mens rea*. This argument, too, should be rejected.

**I. Mody's Statements to Be Offered During the Government's Case-in-Chief Are Not Hearsay Statements Being Offered for the Truth of the Matters Asserted**

Rule 806 of the Federal Rules of Evidence permits the credibility of the declarant to be attacked if the declarant's hearsay statement has been admitted in evidence and further permits that "attack to be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness." Fed. R. Evid. 806. The Fourth Circuit, however, has long recognized that statements of an informant on a tape recording with the defendant are not hearsay. *United States v. Fowler*, 55 Fed. Appx. 125, 127 (4th Cir. 2003); *see also United States v. Mickens*, 53 F.3d 329, 1995 WL 263497 at \*1 (4th Cir. May 5, 1995) (upholding admission of defendant's recorded incriminating statements finding that deceased informant's statements were not hearsay because they were not introduced to prove truth of matter asserted); *United States v. Leake*, 642 F.2d 715, 270 n.6 (4th Cir. 1981) (admitting testimony regarding conversation that was "necessary to explain the context in which [the defendant] made the statements"). This is because such statements by an

informant are “not being offered to prove the matters asserted, but are only being proffered to set the context for [the defendant’s] responses.” *Fowler*, 55 Fed. Appx. at 127 (internal citations omitted). As such, the Fourth Circuit has held that the statements of an informant on a recording with a defendant are properly admitted as “reciprocal and integrated utterance(s) . . . to put [a defendant’s] statements into perspective and make them ‘intelligible to the jury and recognizable as admissions.’” *Id.*

Because of this, the situation contemplated by Rule 806 is inapposite here as to the statements made by Mody in the recordings and documents the government intends to introduce at trial. Indeed, a similar situation was addressed by the Fourth Circuit in *United States v. Sadler*, 1995 WL 82505 (4th Cir. 1995) (unpublished). In *Sadler*, the defendant argued that the district court had erred in permitting recordings of the defendant to be played when the informant was not called as a witness at the trial. *Id.* at \*2. The defendant claimed, in essence, that an informant who had made recordings of the defendant was permitted “to be a witness against him and he was not afforded his right to confront [the informant].” *Id.* The Fourth Circuit rejected that argument:

[W]hile Fed. R. Evid. 806 provides that the credibility of the declarant of a hearsay statement may be attacked by any evidence which would be admissible for that purpose if the declarant had testified as a witness, e.g., by evidence of bias, interest, prejudice, prior conviction of a crime, or inconsistent statements, *the rule does not apply to statements which are not hearsay.*

*Id.* (emphasis added). The same logic and reasoning apply with equal force when applied to the meeting documents challenged by the defendant, as they are integral to the admissions by the defendant captured on the audio tapes.

## **II. Mody's Statements in the Two Recordings with Pfeffer on March 31, 2005 Are Not Being Offered for the Truth of the Matter Asserted**

The defendant, nevertheless, argues that two audio clips from a March 31, 2005 meeting between Mody and Pfeffer, GX 101-1 and GX 101-2, implicate Rule 806. Def. Mem. at 7-9. In neither of these recordings is the government offering the statements by Mody for the truth of the matters asserted. Rather, as recognized in *Fowler, Leake, and Sadler*, the government is offering Mody's statements to provide context to the admissions made by Pfeffer, who at the time of these recordings was conspiring with the defendant to pay him bribes – facts to which Pfeffer has pleaded guilty and for which he is now incarcerated.<sup>1</sup>

The government anticipates that Pfeffer will testify that on or about August 20, 2004, the defendant solicited him for a bribe, that is, 5-7% of Mody and Pfeffer's soon-to-be-formed Nigerian company, W2-IBBS, to go to the defendant's family. Pfeffer is expected to testify that he then passed on that bribe solicitation to Mody, who was Pfeffer's boss. The government also expects that Pfeffer will testify that he was again solicited in the Fall of 2004 by the defendant. This time the defendant asked that his brother, Archie Jefferson, be placed on the payroll of W2-IBBS for \$2,500-\$5,000 per month. Pfeffer passed this solicitation on to Mody as well.

The audio recordings in GX 101-1 and GX 101-2 capture Pfeffer confirming these prior bribe solicitations to Mody. Mody's statements, therefore, are not offered for the truth of the matters

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<sup>1</sup> The fact that the statements sought to be admitted for the truth of the matter asserted are Pfeffer's and not the defendant's in GX 101-1 and GX 101-2 are of no import. *See Bourjaily v. United States*, 483 U.S. 171, 181-82 (1987) (permitting recordings between an informant and a co-conspirator against a defendant under Rule 801(d)(2)(E) and finding no Sixth Amendment violation). The government will establish through Pfeffer's testimony and other evidence the existence of the conspiracy before these recordings are introduced and sought to be played before the jury.

asserted, as she was a cooperating witness with the FBI. Rather her statements are offered to provide context so that the jury will be unable to make sense of Pfeffer's admissions. *See Sadler*, 1995 WL 82505 at \*2. Accordingly, the defendant's claims that the government is seeking to admit Mody's statements for the truth are without basis. That is simply not true.

**A. GX 101-1 – March 31 Meeting Between Mody and Pfeffer Regarding Putting Archie Jefferson on the Payroll**

In GX 101-1, Pfeffer principally discusses the second solicitation from the defendant, that is, putting the defendant's brother on the payroll. In GX 101-1, Mody asks Pfeffer "Okay, what are you talking, what are you referring to?" GX 101-1 at 1. Pfeffer then responds:

No, no, no. I'm just saying (unintelligible). Remember when I talked to you and said we were talking about his brother-in-law or somebody going on the payroll with us once we got things up and going? Remember I told you after your meeting with him?

*Id.* Mody simply replies, "Right." *Id.* After complaining about being left out of meetings and clarifying that he meant "[b]rother, not brother-in-law," Pfeffer then goes on to tell Mody how the defendant asked that his brother be placed on the payroll:

And then Jefferson said, listen, if this thing gets up and running and it's spitting off the cash it does, got to take care of Archie in this deal, because, you know, Jefferson pretty much [expletive] his brother so we could have the deal.

*Id.* at 4. Mody then turns the conversation back to the initial solicitation in New Orleans, and Pfeffer acknowledges the first solicitation and refers to a subsequent conversation about it:

Yeah, but what I was told by him was that he had this discussion at a small part when you and him met without me that time down in D.C. You went and saw him in D.C., I guess? That's when you met this lady from the Nigerian stock market? Then he calls . . .

*Id.* Mody then interrupts Pfeffer to ask about the hiring of the defendant's brother and asks whether this solicitation is "in addition to the seven percent." *Id.* at 5. Pfeffer responds:

If, if we're making those kind of numbers. If those numbers, and it, and it costs us, you know, what 12-, 25,000 dollars a year to keep him [expletive] happy, you know, I don't have a problem with that. I'll take it out of mine. I don't care.

*Id.* The defendant claims that this recording is being offered as a statement by Mody is simply not borne out by the recording itself. It is clear that Mody's statements make Pfeffer's admission, which are in furtherance of the conspiracy, "intelligible to the jury and recognizable as admissions." *Fowler*, 55 Fed. Appx. at 127. As such, the inclusion of Mody's statements contained in GX 101-1 are not offered for the truth of the matter asserted, and therefore, they do not implicate Rule 806. *Sadler*, 1995 WL 82505 at \*2.

**B. GX 101-2 – March 31 Meeting Between Mody and Pfeffer Regarding the Defendant's Family Owning Part of Mody and Pfeffer's Nigerian Company**

In GX 101-2, Pfeffer discusses the solicitation by the defendant for ownership rights for the defendant's family in W2-IBBS. As mentioned above, Pfeffer is anticipated to testify that the defendant asked for 5-7% of W2-IBBS be given to his family, which Pfeffer understood to be in exchange for the defendant performing official acts. This recording reflects that Mody asks Pfeffer: "[H]ow do we put that seven percent, you know, in, in, in the names they need to be in. Technically, how does that happen in Nigeria? How, how, how do we accomplish that?" GX 101-2 at 1. At the time, Pfeffer is conspiring with the defendant to obtain bribe payments. Pfeffer's statements are what is being offered for the truth of the matter asserted. First of all, Pfeffer does not deny this scheme. To the contrary, he confirms it:

Remember when we set up that corporation . . . to give him a percentage of the, we put that in somebody's name. And I, we might even be able to, we might even be able to put in his name. My guess is that . . .

*Id.* at 1. Mody then interrupts and says that is not what the defendant wanted and the following exchange happens:

Mody: That's not, not what he asked for.  
Pfeffer: (Mixed voices) . . . we would not, we would, we would . . .  
Mody: He didn't want to be associated with it.  
Pfeffer: Well, I was just getting ready to say, my guess would be that we'd put his wife on....  
Mody: That's not what he asked for either, though.  
Pfeffer: What did he ask for?  
Mody: He wanted seven percent for the five daughters? Remember, we had that talk?  
Pfeffer: Right. Oh, all right. Well then, we just split it up among the five daughters.  
Mody: Okay.  
Pfeffer: Take seven percent and we...whatever that is, one point whatever for each daughter.  
Mody: All right. I think that that would go a long way to making him feel better about it.  
Pfeffer: Yeah.  
Mody: I don't know, you know . . .  
Pfeffer: Ah, that, that, that I'm not worried about. We can get that done. Especially when we're doing it over in Nigeria. I'm not....

*Id.* at 1-2. The defense cites this exchange for the proposition that Pfeffer is just guessing at what Mody is saying, and therefore, the government is offering Mody's statements for the truth of the matter asserted. The defendant's reliance on this exchange is misplaced. What is apparent from this exchange is that Pfeffer is not only aware of the bribe solicitation but that he is in agreement with it, that is, he is conspiring in the bribery of the defendant. The only disagreement is not whether there is a bribe agreement, but how the bribe should be effectuated, *e.g.*, in whose name or names

the ownership should be placed. Indeed, shortly after this exchange when Mody asks whether the 7% is too much or too little, Pfeffer says whatever the defendant asked for is exactly what the defendant wants:

I think if he asked for seven, I don't think it is too much or too little.  
I think it's, if that's what he wants . . . to get this done, I think it's fair.

*Id.* at 3. Pfeffer even suggests that a higher amount would be fine, too. *Id.* Again, what is important here are Pfeffer's statements, which demonstrate the ongoing conspiracy. Mody's comments merely provide the context to make Pfeffer's admissions "intelligible to the jury and recognizable as admissions." *Fowler*, 55 Fed. Appx. at 127. As such, the inclusion of Mody's statements contained in GX 101-2 are not offered for the truth of the matter asserted, and therefore, they do not implicate Rule 806. *Sadler*, 1995 WL 82505 at \*2.

### **III. Mody's Statements in the Six Contested Documents Are Not Being Offered for the Truth of the Matter Asserted**

The defendant takes issue with only 10 exhibits in his memorandum: GX 3-38C, GX 3-39, GX 3-51A, GX 3-65, GX 3-76, GX 3-130, GX 3-139, GX 3-144, GX 3-153, and GX 3-154. Of those, the government does not intend to seek the admission at trial of GX 3-39, GX 3-65, GX 3-76, or GX 3-153. The government will, therefore, address the remaining six exhibits *seriatim*. These six exhibits are documents that were either created during a meeting between Mody and the defendant in the form of notes, or are checklists used during such meetings on which marginalia was created. The defendant does not argue that audio recordings from any of these meetings at which these documents were used or created implicate Rule 806. Moreover, there are no statements by Mody contained in these six exhibits that will be offered for the truth of the matter asserted. Indeed,



Mody was pretending to be receptive to a bribe solicitation of the defendant; she was not actually, in fact, agreeing to it. The defendant's statements, however, are admissible as the statements of a party opponent offered against the party, pursuant to Rule 801(d)(2)(A). As such, in each instance, the admission of these exhibits would not implicate Rule 806. *See Fowler*, 55 Fed. Appx. 125, 127; *see Mickens*, 1995 WL 263497 at \*1; *Leake*, 642 F.2d 715, 270 n.6.

**A. GX 3-38C – Notes from May 12 Meeting Between the Defendant and Mody**

The government does intend to introduce GX 3-38C.<sup>2</sup> GX 3-38C contains four pages of the original notes made by Jefferson and Mody during the May 12, 2005 meeting. There are no statements contained in GX 3-38C by Mody that will be offered for the truth of the matter asserted.

The notes contained in GX 3-38C are highly relevant as they contain significant admissions by the defendant. As an initial matter, it was during this meeting that the defendant discussed at length the amount of the Nigerian deal that the defendant sought for his family. On the audio recording of this meeting, the defendant can be heard saying, "All these damn notes we're writing to each other as if we thought, as if the . . . FBI's watching us." *See* GX 106-6. Thus, the existence of the notes themselves – regardless of their truth – have independent legal significance. Moreover, at one point, Mody asks the defendant, "What's this say?" The defendant responds, "That's, this, actually . . . this, this, this 'C' is like for children." GX106-4 at 3. The notes contained in GX 3-38C reflect, among other things:

Lori = 50

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<sup>2</sup> Incidentally, GX 3-39 is a copy of GX 3-38C with highlights by Mody reflecting which portions of the handwriting are hers and which portions are the defendant's. The government agrees that such highlighting would be a statement by Mody being offered for the truth of the matter asserted thereby implicating Rule 806, and therefore, the government will not seek the admission of GX 3-39.

iGate = 8  
C = 17

GX 3-38C at 4. As such, taken together, the handwritten notes and his oral clarification of what “C” stands for, are powerful admissions by the defendant – as opposed to assertive statements by Mody being offered for the truth of the matter asserted. Therefore, Rule 806 is not implicated by the government offering these notes in evidence.

**B. GX 3-51A – Checklist from May 31 Meeting Between the Defendant and Mody**

The government intends to introduce GX 3-51A. GX 3-51A is a typed checklist with marginalia on it. This document was brought by the defendant to the May 31 meeting between Mody and the defendant, and it listed a variety of topics for discussion at this meeting, including, for example, “Distribution of stock certificates of W2-IBBS.” GX 3-51A. About one week later, the defendant accepted 1.5 million shares of W2-IBBS in the name of a nominee shell company.

Although the document contains both Mody’s and the defendant’s handwriting, there are no statements contained in GX 3-51A by Mody that will be offered for the truth of the matter asserted. The document is integral to the conversations reflected in a series of audio recordings. *See* GX 110-1, GX 110-2, GX 110-3, GX 110-4, GX 110-5, GX 110-6, GX 110-7. And thus this exhibit will be offered to provide context to those recordings and the concomitant admissions by the defendant. As such, Rule 806 is not implicated by the admission of this document.

**C. GX 3-130 – Notes from July 15 Meeting Between the Defendant and Mody**

The government intends to introduce GX 3-130 during its case-in-chief. GX 3-130 contains handwritten notes made by Lori Mody and the defendant during a July 15 meeting. These notes are integrated into the audio admissions by the defendant when speaking with Mody. These notes

reflect, for example, that the defendant is seeking “9.2” from Mody. This is captured in the audio clip from GX 120-5 in which Mody says to the defendant, “I said, ‘If you can do that then I can do this. 9.2, I can do this.’” GX 120-5. The defendant responds, “Mm hmm.” *Id.* Accordingly, the notes by Mody will not be offered for the truth of the matters assert, and thus, they will not implicate Rule 806.

**D. GX 3-154 – Checklist with Notations from July 30 Meeting Between the Defendant and Mody**

The government intends to introduce GX 3-154.<sup>3</sup> GX 3-154 is a “Master Action Item Checklist” that Lori Mody brought to the July 30, 2005 meeting with the defendant that reflects notations made by Mody and Jefferson during this meeting. This is the day that the defendant takes the briefcase with \$100,000 cash in it from the trunk of the car in the Ritz-Carlton’s parking lot. GX 3-154 was prepared by the FBI. The document itself provides an outline of subjects that were discussed by Mody and the defendant. For example, it indicates on the checklist:

**W2 IBBS located in Nigeria**

- ☐ 7/29 Letter to his Excellency (J)
- ☐ 7/30 Package (M)

Agent Thibault will be able to testify that the “J” referred to Jefferson and the “M” referred to Mody, and that the “Package” referred to on the checklist referred to the \$100,000 in the briefcase, which Mody delivered to the defendant at the conclusion of the meeting. Indeed, on one of the audio clips from this July 30 meeting, after previously discussing the letter that the Vice President (GX 125-1), Mody can be heard saying to the defendant, “And, uh, when you take care of that, you’ll take care

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<sup>3</sup> Incidentally, GX 3-153 contains Mody’s notes saying what is her handwriting and what is the defendant’s handwriting on GX 3-154. Accordingly, the government will not be offering GX 3-153 in evidence.

of the second one, too, I presume.” GX 125-6. The defendant responds, “Mm-hmm.” *Id.* Without GX 3-154 to provide any context, the defendant’s statement will not be “intelligible to the jury and recognizable as admissions.” *Fowler*, 55 Fed. Appx. at 127. As such, the inclusion of any handwriting by Mody on GX 3-154 is not offered for the truth of the matter asserted, and therefore, they do not implicate Rule 806. *Sadler*, 1995 WL 82505 at \*2.

**E. GX 3-139 – Checklist with Notations from July 31 Meeting Between the Defendant and Mody**

The government intends to introduce GX 3-139. GX 3-139 is a handwritten checklist that Mody brought with her to July 31, 2005 meeting. Agent Thibault saw this checklist before Mody took it into her meeting with the defendant. The document had handwritten check boxes such as before such items as “Do we have a deal w/ the VP,” “What does he want,” “Do we need to pay him anything up front,” and “Does the VP know you have a financial interest in this deal.” GX 3-139. These statements by Mody are not offered for the truth of the matter asserted. Again, she is not, in fact, agreeing to bribe the Nigerian Vice President. Her statements, however, do provide context for the defendant’s statements.

But more importantly, the defendant made notations on GX 3-139. Agent Thibault will identify portions of Mody’s handwriting and portions of the defendant’s handwriting. For instance, under the heading “Ghana,” the defendant crossed off “WJ” and wrote “Global.” These are powerful admissions regarding the defendant’s attempts at concealment and his consciousness of guilt. Accordingly, the government is not offering Mody’s notations for their truth, and thus those notations do not implicate Rule 806.

**F. GX 3-144 – Checklist with Notations from August 1 Meeting Between the Defendant and Mody.**

The government intends to introduce GX 3-144 in evidence. It is another checklist that Mody took with her to August 1 meeting with the defendant, which was just two days after the defendant picked up the \$100,000 in a briefcase. Although GX 3-144 does contain some handwriting by Mody in the margins, none of this handwriting will be offered for the truth of the matter asserted. As with the other checklists noted above, this checklist provides necessary context to the recordings the government will seek to introduce at trial. *See* GX 124-1, GX 124-2, GX 124-3, GX 124-4, GX 124-5, GX 124-6, and GX 124-7. For example, this checklist contains, among other things, the following list:

**W2 IBBS located in Nigeria**

8/1 Letter to his Excellency

8/1 Goodwill present (upfront)

GX 3-144. In other words, GX 3-144 is the outline along which the defendant and Mody speak on August 1. Mody's notes made on this document are simply immaterial and are not being offered for the truth of the matter asserted. As such, Rule 806 is not implicated by the admission of this document in the government's case-in-chief.

**III. If Mody Is Not Called as a Witness and Her Statements Are Not Offered for the Truth of the Matters Asserted, Her Credibility Is Not at Issue**

Besides the exhibit-specific arguments raised by the defendant, he also argues that even if Mody is not a declarant within the meaning of Rule 806, her credibility remains relevant in this case. Def. Mem. at 13-17. In other words, even if this Court were to rule that both of the audio clips and the six challenged documents implicated Rule 806 and the government therefore agreed not to seek their admission at trial thereby avoiding the implication of Rule 806, the defendant still claims a right

to the records and information before the Court. That contention does not square with the consistent holdings of the Fourth Circuit, and numerous other courts, that a confidential informant or cooperating witness's credibility is simply "not at issue" when he or she does not testify. *United States v. Lewis*, 274 Fed. Appx. 259, 260 (4th Cir. Apr. 17, 2008) ("Because the confidential informant did not testify, his credibility was not at issue.").

In *United States v. Sanchez*, for example, the defendant sought to cross-examine two law enforcement agents about an informant's violation of his cooperation agreement and the amount of money he was paid. The district court did not permit either line of questioning "because neither was relevant to any issue in the case." 118 F.3d 192, 196-97 (4th Cir. 1997). The Fourth Circuit affirmed, finding the defendant's objection to these rulings on appeal to be "without merit." *Id.* The court explained that since the informant did not testify against the defendant, his "general dishonesty and credibility, to which details of his cooperation might be relevant, were not at issue." *Id.* See also *United States v. Williams*, 954 F. 2d 668, 672 (11th Cir. 1992) ("The law is clearly established that one may not introduce evidence to impeach a witness who does not testify."); *Walker v. True*, 67 Fed. Appx. 758, at \*10 (4th Cir. May 6, 2003) (statements to detective could not be characterized as impeachment evidence because declarant did not testify), *rev'd on other grounds*, 540 U.S. 1013 (2003).

The defense argues, nevertheless, that Mody's credibility is relevant because she "deliberately made Mr. Jefferson aware of her emotional difficulties as a tool to manipulate his behavior." Def. Mem. at 13. The defendant does not cite a single case, much less a Fourth Circuit case, that supports this argument. The defendant even admits that he "was not aware at the time [of the undercover investigation] of the contents of the records now being reviewed by the court." *Id.* at 16. Thus, the

defendant's argument that such records before the Court could somehow be relevant to his entrapment defense, or in any way shed light upon his purported lack of criminal intent, is not only legally baseless but also irrelevant as a factual matter. Said differently, the defendant simply cannot show how records and information to which he was not privy in the Summer 2005 could have any impact on whether he was allegedly entrapped by the FBI or otherwise had not formed the necessary mens rea to be guilty of the offenses charged.

At the end of the day, if the defendant wants to claim, as part of his apparent entrapment defense, that he was entrapped because of Mody's statements to him about her condition, then the defendant can take the witness stand, take an oath, and subject himself to cross-examination. The matters before this Court -- when Mody is not being called to testify and no hearsay statements are being offered from her by the government -- are simply not material to such a defense. *Lewis*, 274 Fed. Appx. at 260.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 17th day of June, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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